IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-750

JAMES P. D'ANGELO, RECEIVER FOR PAPANTLA ROYALTIES CORPORATION, a dissolved Delaware corporation,

Petitioner,

v.

PETROLEOS MEXICANOS, a decentralized institution pertaining to the Republic of Mexico,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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Opinions Below

In addition to the decisions mentioned in the petition, the District Court also denied petitioner's motion for re-argument in a decision reported at 422 F. Supp. 1291 (D. Del. 1976) and attached as an appendix hereto.

Question Presented

Whether the acts of the Government of the United Mexican States ("Mexico") and its duly authorized representatives in promulgating the 1938 oil expropriation decree

(the "Expropriation Decree") and in determining the claims for compensation filed by those affected thereby, including Papantla Royalties Corporation ("Papantla"), warrant the application of the act of state doctrine?

Statement of the Case

This action arises out of the 1938 expropriation by Mexico of the real and personal properties of various foreign-owned oil companies doing business in Mexico. Petitioner, as receiver for Papantla, seeks an accounting from Petroleos Mexicanos ("Pemex") in respect of alleged "royalty or participation interests" in concessions formerly held by two of the major oil companies directly expropriated in 1938, Sinclair Oil Company and Aguila. (Pet. App., pp. A 7, A 34.)* Pemex is a decentralized agency of the Mexican Government created by special act of the Mexican Congress shortly after the 1938 expropriation for the purpose of managing the nationalized Mexican petroleum industry. (Pet. App., p. A 34.)

The Papantla interests claimed by petitioner were derived from contractual arrangements concluded by Papantla's principal, Roscoe B. Gaither ("Gaither"), with Aguila and Sinclair. Prior to 1938, Gaither had assisted various Mexican landowners in applying for and obtaining oil concessions from the Mexican Government, which granted to the concessionaires the right to exploit oil in designated areas. Since these landowners were not financially in a position to operate the concessions, Gaither also assisted in negotiating the transfer of the concessions to Aguila and Sinclair, which possessed the financial and technical resources required to engage in the oil industry.

* References herein in the form "Pet. App., p. A ...." are to the pages of the appendices to the petition.

In return, Gaither received contractual rights to receive a portion of the oil produced (or the revenues derived from the sale of oil produced) by Aguila and Sinclair pursuant to the concessions transferred to them by the landowners through Gaither's mediation. These contractual rights were assigned by Gaither to Papantla and are the "royalty or participation interests" at issue in this action. (Pet. App., pp. A 6-8.)

In 1938, the real and personal properties of Aguila and Sinclair, including their concessions, were expropriated by decree of the President of Mexico. (Pet. App., pp. A 7-8, A 39.) Consequently, the contractual obligations of Aguila and Sinclair to Papantla and others, which were dependent upon the expropriated concessions, were extinguished. (Pet. App., p. A 39.) The royalty and participation interests now asserted by petitioner were therefore terminated in 1938 by operation of the Expropriation Decree.

In the years following the Expropriation Decree, the Mexican Government recognized that, in addition to the major oil companies directly expropriated, many others who had held ancillary interests such as those of Papantla had also suffered damage as a consequence of the nationalization. (Pet. App., p. A 49.) In order to alleviate the hardships imposed on such persons, the Government instituted a special administrative procedure through which they might be accorded equitable compensation. By Presidential decrees addressed specifically to this subject, the President of Mexico established governmental commissions to investigate the validity of the thousands of claims for compensation expected to be filed by former holders of royalty and participation interests and to accord compensation to those whose claims were found valid. (Pet. App., pp. A 49-52.) Gaither, on behalf of Papantla, took advantage of this administrative procedure and submitted to the

appropriate commissions each of the Papantla claims asserted herein. Upon a thorough review of these claims by the commissions, seven were found meritorious, and compensation was duly accorded. The remainder of Papantla's claims were rejected on various grounds, and thus no compensation therefor was ever granted. (Pet. App., p. A 54.) Dissatisfied with the determinations of the commissions and the compensation received, petitioner sought recovery on the alleged royalty or participation interests in this action, nearly forty years after the promulgation of the Expropriation Decree.

Thus, petitioner's suit does not arise out of any commercial contract between Papantla and Pemex, as no such contract ever existed. Although Pemex, as the governmental agency entrusted with public management of the petroleum industry in Mexico, routinely engages in commercial activities, these activities are irrelevant to this litigation.

In granting respondent's motion for summary judgment, the District Court held that the Expropriation Decree terminated and extinguished Papantla's royalty or participation interests, and that the validity of the Expropriation Decree could not be reviewed in a United States court under the act of state doctrine. The District Court further held that the actions of the governmental commissions established to hear claims for compensation filed by persons such as Papantla, with respect to the same claims now asserted by petitioner in the instant case, were also within the ambit of the act of state doctrine. On appeal to the Third Circuit Court of Appeals, a three-judge panel unanimously affirmed the decision of the District Court without opinion.

ARGUMENT

I.

The District Court's Application of the Act of State Doctrine Is Clearly Correct.

The District Court's decision on the act of state doctrine rests on the fundamental and well-settled principle enunciated by this Court in *Underhill* v. *Hernandez*, 168 U.S. 250 (1897), and consistently applied in the years since that decision, namely, that sovereign acts performed by a foreign government within its own territory are not properly subject to review in a United States court. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918). In view of the decisions cited above, the District Court correctly applied the act of state doctrine to both the Expropriation Decree and the actions of the Mexican commissions with respect to Papantla's claims for compensation.

A. *The Expropriation Decree.*

It is well established that an expropriation decree such as the decree promulgated by the President of Mexico in 1938 is the classic example of an act of state. *Banco Nacional de Cuba* v. *Sabbatino, supra.* As confirmed in an official declaration issued by the Attorney General of Mexico, acting in his capacity as the Mexican Government's highest legal officer and pursuant to express statutory authority, that sovereign act terminated participation interests such as those of Papantla, which were dependent upon the expropriated concessions formerly held by Aguila and Sinclair. (Pet. App., pp. A 37-42.)

Petitioner now asserts that the District Court should not have accorded to the Attorney General's official declaration the same effect given by this Court to an equivalent declaration of the Russian Commissariat for Justice in *United States* v. *Pink*, 315 U.S. 203 (1942). This argument is based solely on the contention that the decision in *United States* v. *Pink* requires that a formal declaration of an appropriate official of a foreign government as to the scope and effect of its own decrees must be requested through diplomatic channels. However, nothing in the *Pink* decision supports petitioner's contention. Although the United States Government did request the Commissariat's formal statement in *Pink*, that circumstance was simply due to the fact that the United States happened to be the plaintiff therein.

Moreover, the District Court noted that the Attorney General's statement stands uncontroverted in the record. (Pet. App., pp. A 41-42. See also the District Court's opinion on petitioner's motion for reargument, 422 F. Supp. 1291 (D.Del. 1976) (pages A 2-4 of the appendix hereto). Indeed, the history of Papantla's claims for compensation before the commissions established by the Mexican Government to hear claims of persons formerly holding participation interests in oil produced from expropriated concessions itself makes clear the effect of the Expropriation Decree on Papantla.

Since petitioner's action necessarily involves a challenge to the validity and effect of the Expropriation Decree, a uniquely sovereign act performed by the Mexican Government within its own territory, the District Court's decision to apply the act of state doctrine was clearly correct.

B. *The Mexican Commissions.*

Apart from the Expropriation Decree itself, this case involves several other acts of state (not discussed in the

petition herein) affecting the alleged Papantla interests. Recognizing the hardships imposed upon persons such as Papantla by reason of the 1938 expropriation, the President of Mexico, in the exercise of his sovereign authority as chief executive, formally promulgated decrees pursuant to which special governmental commissions were established to hear claims for compensation. (Pet. App., pp. A 49-52.) All of the claims now pressed by Papantla herein were submitted and thoroughly reviewed by those commissions. (Pet. App., p. A 54.) The promulgation of formal Presidential decrees instituting this special administrative procedure and the determinations made by the appropriate governmental commissions specifically with respect to the Papantla claims for compensation filed by Gaither were all acts of the Mexican Government performed within its own territory in the exercise of its sovereign authority. Therefore, the District Court properly held those actions to be beyond the scope of review of a United States court under the act of state doctrine. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba, supra; Banco Nacional de Cuba* v. *Sabbatino, supra; Oetjen* v. *Central Leather Co., supra; Ricaud* v. *American Metal Co., supra; Underhill* v. *Hernandez, supra.*

II.

The Decisions Below Are Completely Consistent with the Applicable Decisions of this Court.

A. *There Is No Relevant International Agreement Precluding the Application of the Act of State Doctrine.*

The major portion of petitioner's argument is grounded upon an alleged executive agreement between the United States and Mexico flowing from certain conferences held by representatives of both countries in Mexico in 1923 (the "Bucareli Conferences"). Thus, petitioner argues that the

decisions below are in conflict with the decision in *Banco Nacional de Cuba* v. *Sabbatino, supra,* in which this Court held that the act of state doctrine precludes review by a United States court of the validity of an expropriation effected by a foreign government within its own territory, even if a violation of customary international law is alleged, unless there exists an unambiguous treaty or agreement regarding controlling legal principles. 376 U.S. at 428. However, quite apart from the fact that no violation of international law exists in the present case, petitioner cannot meet even the threshold requirement of his own argument, namely, the existence of a relevant executive agreement between the United States and Mexico.

The purported executive agreement relied on by petitioner to invalidate the Expropriation Decree is quoted in the petition (pp. 3-6). Far from constituting an executive agreement of the United States, the passages in question are simply the minutes of a meeting between representatives of the United States and Mexico during the 1923 Bucareli Conferences and constitute nothing more than broad declarations of policy by the Mexican representatives. (Pet. App., pp. A 45-49.) Moreover, the very source from which petitioner quotes acknowledges, shortly after the transcript of the statements of the Mexican Commissioners, that those statements "do not commit the Mexican state to the same extent the treaties do, that is, with a strict bond of law." Petitioner's source further asserts that the statements relied on by petitioner as constituting a binding agreement "merely enunciate the conduct that the government in behalf of which they were made meant to follow," and therefore they could be "amended or repudiated by later governments." (Pet. App., p. A 48.)

In order to ascertain the position of the United States Government on the status of the alleged "Payne-Warren

agreement," respondent's counsel addressed a direct inquiry to the State Department. Responding to that inquiry, the Acting Assistant Legal Advisor for Treaty Affairs confirmed in simple but unequivocal terms that "the said document is not a treaty or executive agreement of the United States." (Pet. App., p. A 48.)

As stated by the District Court with respect to the argument now raised by petitioner:

> It is sufficient to point out that the Bucareli Conferences did not result in an agreement of any kind between Mexico and the United States. (Pet. App., p. A 46.)

Later, the District Court added:

> Plaintiff's contention that an agreement or treaty between the United States and Mexico was entered into at the Bucareli Conferences is negated by all the material evidence in the record. What the Mexican Commissioners said at the conferences amounted to nothing more than a declaration of policy of the existing government which was subject to amendment or revocation by the government at any time in the future. (Pet. App., pp. A 48-49.)

Thus, the District Court's holding on the act of state doctrine, as unanimously affirmed by the Court of Appeals, is clearly not in conflict with this Court's decision in *Sabbatino, supra.*•

• Petitioner has made two additional arguments concerning the purported executive agreement. First, petitioner contends that the decisions below conflict with *B. Altman & Co.* v. *United States,* 224 U.S. 583 (1912), a case which did not in any way involve the act of state doctrine, but the issue of whether an agreement concededly and actually concluded by the United States with France under Congressional authority constituted a "treaty" within the meaning of a particular statute permitting direct appeals to the

B. *The Decisions Below Are Completely Consistent with the Decisions of this Court on the Act of State Doctrine.*

Petitioner contends that the decisions below conflict with the holding in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba, supra,* in which this Court confirmed that the act of state doctrine does not apply to acts of a foreign government or its representatives performed in the exercise of commercial, rather than sovereign authority. However, as the District Court made clear, the acts in question in the instant case indisputably were performed in the exercise of the sovereign authority of the Mexican Government.

The central act giving rise to this litigation is the Expropriation Decree itself, a uniquely sovereign act manifestly within the purview of the act of state doctrine. *Banco Nacional de Cuba* v. *Sabbatino, supra.* As noted by the District Court:

> The fact that the Mexican government ultimately entered the oil business through Pemex does not make the expropriation itself commercial activity. It is a classic example of the exercise of a governmental power as an act of the sovereign. (Pet. App., p. A 44.)

Supreme Court. By way of contrast, the unmistakably clear record in the present case, including a statement from the State Department and the views of the very source relied on and quoted by petitioner, supports the finding below that no relevant agreement whatsoever exists. Petitioner's other argument is that the validity and effect of the so-called 1923 "Payne-Warren agreement" is an important question affecting the foreign relations of the United States. This argument is equally untenable since it is no more than a reformulation of petitioner's unsupportable contention that a relevant executive agreement exists. In addition, with respect to the issue of the foreign relations of the United States, it may be noted that not only did the State Department confirm the absence of any executive agreement in this case, but it also declined petitioner's request to notify the Court that the act of state doctrine should not be applied. (Pet. App., pp. A 57-58.)

In addition to the Expropriation Decree, which itself would warrant the application of the act of state doctrine under *Dunhill* and *Banco Nacional de Cuba* v. *Sabbatino, supra,* the District Court held the actions of the Mexican governmental commissions appointed to hear claims for compensation filed by persons such as Papantla to be acts of state. Although petitioner has not even recognized this part of the District Court's holding, it is clear that the actions of the Mexican commissions, to which Papantla submitted all of its claims, were taken in the exercise of the sovereign authority delegated to the commissions by the President of Mexico. Unlike the circumstances of *Dunhill,* in which there was no evidence that the agents of the Cuban Government had any authority other than to operate cigar businesses commercially on behalf of the Cuban Government, the sovereign authority and functions of the Mexican commissions were embodied in formal Presidential decrees introduced into the record by respondent. With respect to *Dunhill,* the District Court stated:

> The situation in *Dunhill* contrasts sharply with the instant one. The *only* evidence of an act of state in *Dunhill* was the non-payment by the interventors of Dunhill's claims and the denial of liability by the Cuban attorneys. In the present case an act of state is evident in the record. The presidential decrees created the commissions for the specific purpose of determining the claimants entitled to indemnification and to provide for it. It was the functioning of the commissions within this area of their specific presidential authorization which resulted in their rejection of and failure to pay Papantla's claims. (Pet. App., p. A 54.)

Thus, this case does not involve any failure by Pemex to comply with commercial obligations arising out of its routine commercial activities; nor does it involve any com-

mercial contract or relationship whatsoever between Papantla and Pemex. Rather, petitioner seeks to have a United States court review the sovereign actions taken by the Mexican Government not only in promulgating the Expropriation Decree, but also in determining the validity of the Papantla claims for compensation filed with the appropriate Mexican commissions established for that purpose. The decisions of the District Court and Court of Appeals are therefore completely consistent with *Dunhill, supra*, and indeed with every other decision on the act of state doctrine rendered by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 20, 1977

APPENDIX

APPENDIX

Memorandum Re Plaintiff's Motion for Reargument

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

Civil Action No. 74-17

JAMES P. D'ANGELO, RECEIVER FOR PAPANTLA ROYALTIES CORPORATION, a dissolved Delaware corporation,

Plaintiff,

v.

PETROLEOS MEXICANOS, a decentralized Institution pertaining to the Republic of Mexico,

Defendant.

William H. Bennethum, III, Esquire, Wilmington, Delaware, attorney for plaintiff.

Arthur G. Connolly, Jr., Esquire, of Connolly, Bove & Lodge, Wilmington, Delaware, attorney for defendant and Manuel R. Angulo, Esquire and Jose T. Moscoso, Esquire, of Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, of counsel.

Wilmington, Delaware

November 4, 1976

STEEL, Senior Judge:

Plaintiff's motion for reargument calls for several comments:

1. No "unambiguous agreement" was arived at at the Bucareli Conferences. See discussion in Opinion of October 7, 1976. Plaintiff's argument that the "unambiguous agreement" rendered the expropriation decree ineffective so far as Papantla's rights were concerned, rests upon the fallacious assumptions that an "unambiguous agreement" was arrived at at the Bucareli Conferences. The letter dated September 13, 1976, to Mr. Bennethum from Mr. Rovine of the State Department (Exhibit A attached to the Ross affidavit of September 16, 1976, Doc. 127) states that the Bucareli meetings, although themselves not constituting an international agreement, nevertheless did give rise to two conventions which did become international agreements. These conventions as appears from Exhibit B attached to the Ross affidavit were known as the General Claims Convention and the Special Claims Convention. Plaintiff has conceded that both of these conventions are irrelevant to the instant case. (Transcript dated September 17, 1976, pp. 27-28, Doc. 128).

2. Plaintiff asserts that the specific procedure and notice required by the Mexican constitution of laws were not complied with in the case of Papantla. Plaintiff points to no provision of either which mandated the giving of notice to Papantla and the other holders of royalty and participating interests in the confirmatory concessions held by the oil companies. It is an uncontroverted fact that the expropriation decree was published in the official gazette and personal notice thereof was given to the 17 oil com-

panies named in the decree as required by the expropriation law of 1936. That law did not require that notice be given to those whose rights were extinguished "as a consequence or result of the taking" but only with respect to those whose property was stated to have been expropriated. (Responses to Supplemental Interrogatories Directed to Defendant 17(c)(1)A, Doc. 104, p. 14). In any event this Court may not inquire into the validity of the expropriation decree under the law of Mexico since the expropriation is an act of state. Cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 415, fn. 17 (1963).

The 17 oil companies which were the subject of the decree were deprived by it of ownership of all of their real and personal property. Among the items of personal property affected by the decree were the rights of the companies to explore and exploit the oil in the subsoil which was derived from their concessions originally issued in their name or assigned to them by the surface owners. The case of *Tenex, S.A.* Judicio de Amparo, No. 6204/58/2a dated January 18, 1960, decided by the Supreme Court of Justice of Mexico, held that the decree deprived Transcontinental* of the confirmatory concessions held by it and of the rights inherent therein. The Court recognized that the obligations of the oil companies to third parties had not been expropriated but stated that nevertheless they were extinguished because compliance by the oil companies with their obligations to pay royalties had become legally

* Transcontinental was not a company named in the expropriation decree but was an oil producing Mexican subsidiary or affiliate of Suasteca Petroleum Company, the latter of which was named in the decree. See letter dated October 20, [1976], from Arthur G. Connolly, Jr. and letter dated November 3, 1976, from William H. Bennethum, both of which were addressed to the Court in response to the Court's letter to them dated October 18, 1976. (Doc. 132).

impossible of fulfillment because of the expropriation of their concessions. (Doc. 104, p. 15). The opinion of the attorney general of Mexico which is discussed in the Opinion of October 7, 1976, coincides identically with the holding by the Supreme Court of Justice of Mexico in *Tenex, S.A.*

3. *United States* v. *Pink*, 315 U.S. 203 (1942) may be factually distinguishable, as plaintiff asserts, but the principle established by it is applicable to the facts of the instant case.

Plaintiff's motion for reargument will be denied.